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November 12, 1998

VIA FEDERAL EXPRESS

200353

Muthu Sundram, Esquire
Assistant Regional Counsel
Office of Regional Counsel
New Jersey Superfund Branch
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: Caleb Brett

Dear Mr. Sundram:

I represent, and this response is submitted on behalf of, Caleb Brett USA, Inc. ("Caleb Brett" or "the Company"). Caleb Brett recently received a General Notice Letter and Notice of Negotiations for Remedial Investigation/Feasibility Study ("General Notice Letter") from the Environmental Protection Agency Region II ("EPA") regarding the LCP Chemical, Inc. ("LCP") Superfund site (the "Site" or "the LCP Site") in Linden, Union County, New Jersey. Pursuant to the General Notice Letter, the EPA invites certain identified potential responsible parties (PRPs) to assume responsibility for voluntarily financing and/or performing the remedial investigation/feasibility study ("RI/FS") contemplated for the LCP Site as well as to reimburse EPA for the costs of investigation incurred by the agency to date.

Caleb Brett respectfully declines to voluntarily finance and/or perform the RI/FS study at this time because as demonstrated below, the Company is not a PRP at the LCP Site. This position is supported by the information known regarding the contamination at the Site and the limited nature of Caleb Brett's contacts with the LCP Site.[1/]

1. Caleb Brett's limited use of the LCP Site

The Draft Administrative Order on Consent for the Remedial Investigation and Feasibility Study for the LCP Site ("Draft Order on Consent") which was provided with

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1/ I have called you on several occasions to obtain more information regarding the basis of EPA's belief that Caleb Brett is a PRP at the LCP Site, but you have not returned my calls as of the date of this letter.

the General Notice Letter, notes that the Site occupies approximately 26 acres of filled marshland in a heavily industrial area of Linden, New Jersey. The Site was purchased by the GAF Corporation in 1950 which developed the property into a chlorine and sodium hydroxide production facility.

GAF conducted chemical production operations at the Site from 1952 to 1972 and then sold the property to LCP Chemical. LCP continued to produce chlorine until 1985, at which time chemical production at the Site ceased.

Caleb Brett's limited use of a small portion of the LCP Site did not begin until after the cessation of chemical manufacturing at the Site. The Company leased at first an approximately 900 sq. ft. area and beginning in 1991, a smaller 540 sq. ft. area in the Shops and Services Building for the limited purpose of temporarily storing retain and testing samples. Materials were stored at the Site in pint and quart size containers with an occasional one or five gallon metal container utilized as well. The samples were stored on metal shelving.

Some of these materials were sent to and tested at the Company's laboratory at 333 Dalziel Road in Linden, New Jersey. The retain samples were either returned to the customer or properly disposed of at the Company's Linden, New Jersey laboratory. There was no analysis, sampling, treatment or disposal of any kind conducted by Caleb Brett at the LCP Site.

There is no indication that any of the materials stored at the Site were released into the environment which would trigger liability under CERCLA. To the contrary, the room had cinder block walls and concrete floors and, at the termination of the lease, the room was returned to LCP in broom-clean condition.

In light of the above facts, it is clear that Caleb Brett is not liable under CERCLA for the response costs incurred or to be incurred by EPA with respect to the LCP Site.

2. Caleb Brett is not an "operator" as that term is defined under §107 of the Comprehensive Environmental Response and Liability Act ("CERCLA")

Under CERCLA §107, responsible persons include the current "owner" or "operator" of the facility; any person who owned or operated the facility at the time of

disposal of a hazardous substance; any person who arranged for disposal or treatment of hazardous substances; and any person who accepts hazardous substances for transport to a disposal or treatment facility. 42 U.S.C. §9607. Caleb Brett was never an owner of the Site, did not arrange for the disposal or treatment of hazardous substances at the Site and did not accept hazardous substances for transport to the LCP Site. The only possible category of liable parties that would apply to Caleb Brett's use of the Site is operator liability. The facts conclusively demonstrate, however, that Caleb Brett was not an operator of the Site as contemplated under §107. Furthermore, the room that it leased was not a "facility" as that term is defined under CERCLA.

An "owner or operator" is defined under CERCLA §101(20)(A) as "any person owning or operating the facility." In order to incur liability as an operator, a party must exhibit some measure of control over site operations. Case law expounding on this proposition provides that a party must exhibit either "actual" control of the site in question or an "authority to control" operations at the site.

The Third Circuit has adopted the "actual control" standard which requires "actual participation and control over site decisions regarding the use and disposal of hazardous substances." Landsford - Coaldale Water Authority v. Tonolli Corp., 4 F. 3rd 1209 (3rd Cir. 1993). (A corporation will be held liable when there is evidence of substantial control exercised by it over activities of the offending corporation, and it is not enough that the corporation had unutilized capability to control.) See also Lentz v. Mason, 961 F.Supp 709 (D. N.J. 1997). The inquiry into determining whether a party has exercised sufficient "substantial control" over site operations requires a consideration of the "totality of the circumstances presented." 4 F. 3rd 1209, 1222 (3rd Cir. 1993). A fair and reasoned understanding of the facts of Caleb Brett's limited use of the LCP Site makes it abundantly clear that Caleb Brett was not an operator of the LCP Site.

As noted above, Caleb Brett leased a 900 sq. ft. and then a 540 sq. ft. area on the 27 acre LCP Site that had historically been used for chemical manufacturing. Company personnel had limited access to the storage room only and had no access to, responsibility for, or other involvement with any operations at the Site. The contamination, and the various release incidents which occurred at the Site, as described in the Draft Order of Consent, pre-dated the time period that Caleb Brett rented its storage room. Even under the more expansive "ability to control test," it is clear that Caleb Brett had no such authority. The Company's use of the property was limited to the storage of small quantities of material in a

storage room with cinder block walls and concrete floors which was far removed in time and place from the industrial operations that occurred at the Site.

Furthermore, Caleb Brett had no authority or responsibility for generating, managing, handling or storing the released substances. The Company's only interest in the Site was limited to leasing a room used for storage. The lease of a remote storage room does not rise to the level of operating the facility as contemplated under CERCLA and the interpretive caselaw. Accordingly, Caleb Brett was never an operator of the LCP Site.

3. Caleb Brett is not a PRP at the LCP Site because there has been no release from the "facility" over which it had control.

Caleb Brett is also not liable as a PRP at the LCP Site because the leased storage room to which it had access is a "facility" distinct from the areas where the releases of hazardous substances apparently took place. CERCLA Section 101(9) defines a "facility" to include buildings, structures, storage containers, or other areas "where a hazardous waste has been deposited, stored, disposed of, or placed, or otherwise come to be located."

There has been no release of hazardous substances in, from, or near the room leased by Caleb Brett. In Nurad, Inc. v. William K. Hooper and Sons Company, 966 F.2nd 837 (4th Cir. 1992), a tenant, in facts remarkably similar to the LCP Site situation, was found not to be liable for the releases from an underground storage tank located on the same parcel of land.

In Nurad, the plaintiff brought a cost recovery action against various parties, including former tenants at the Site, for the cost of cleanup associated with the release of hazardous substances from certain underground storage tanks located on the property. Nurad argued that the former tenants were operators of a facility despite the fact that they had no control over the tanks in question.

The Fourth Circuit affirmed the District Court holding that the tenants' operations were distinct from those that led to the release of hazardous substances.

> To be sure, the tanks are part of a larger piece of property that is now the Nurad site. During the relevant period, however, the Site was subdivided and separate portions of it were leased out to individual tenants. The fact that those tenants may have had control over a building that was adjacent to the

> USTs is irrelevant under the statute; a defendant operates a "facility" only if it has authority to control the area where the hazardous substances were located . . . The statute places accountability in the hands of those capable of abating further environmental harm, while Nurad's proposed definition of "facility" would rope in parties who were powerless to act.

966 F.2d. at 843 (Emphasis added).

This reasoning is applicable to the instant case. As a tenant for a small, discreet and confirmed storage area which never experienced a release of a hazardous substance, Caleb Brett was unable to control the handling and release of the hazardous substances which occurred elsewhere on the Site. Caleb Brett had no interest in, participation in, or relation of any kind to the chemical manufacturing and disposal activities which historically occurred at the Site. Any imposition of liability on Caleb Brett would violate both the text and policy of CERCLA, which seeks to place responsibility on those parties best able to prevent the release and not on those parties who have no capacity to address, prevent or remedy environmental harm.

Caleb Brett is not an "operator" of a "facility" under CERCLA §107 and accordingly, respectfully declines to participate in either financing or performing remediation efforts at the LCP Site.

Sincerely,

Thomas M. Lingan

TML/kdw
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cc: Robert F. Maher, Esquire
William Cherepon, ITS - Caleb Brett